

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

JUDGMENT

National Insurance Co. Ltd. Vs. Smt.Jani & ors.

S.B.CIVIL MISC. APPEAL NO.984/2001

Against the award dated 20.11.2000
made by the Motor Accidents Claims
Tribunal (I), Jodhpur in Claim Case
No.113/1996.

Date of Judgment : 26.07.2006

PRESENT

HON'BLE MR.JUSTICE DINESH MAHESHWARI

Mr. Jagdish Vyas for the appellants

Mr. Dhanpat Choudhary for the claimant-respondents

BY THE COURT:

Though listed for orders on stay application, with the consent and at the request of learned counsel for the parties, the matter has been heard finally in view of short question involved.

The insurer has chosen to maintain this appeal against the award dated 20.11.2000 made by the Motor Accidents Claims Tribunal (I), Jodhpur in MAC Case No.113/1996 only in relation to the directions issued by the Tribunal, while exonerating the insurer of its liability, to make payment of the award amount of Rs.71,000/- with interest at the rate of 12%

per annum to the claimants and then to recover the same from the insured. The Tribunal exonerated the insurer of its liability while deciding in issue No.3 that the driver of the offending vehicle was not possessing valid driving licence and there was violation of policy conditions.

Background facts are that on 02.02.1996 at about 7.30 p.m. a pedestrian Smt.Yat Khatun, aged 60 years, was hit by a scooter bearing registration No. RJ 19 1M 8523 driven by non-applicant No.1; she sustained grievous injuries and was taken to hospital where she breathed her last at 11.40 p.m. The children of the deceased made a claim for compensation in the sum of Rs.3,03,000/- against the driver, owner and insurer of the offending vehicle. The non-applicant No.3 Smt. Rashmi, registered owner of the scooter, alleged to have sold the vehicle to the non-applicant No.1 Rajesh alias Kalu on 05.10.1995 and having handed over possession thereof after executing a sale deed and, therefore, she denied of any liability in her. The insurer, non-applicant No.4 while denying the claim averments and alleging that the accident occurred for the mistake of the deceased herself, raised objection that the non-applicant No.1 was not holding a valid driving licence and, therefore, there was no liability in the insurer. Following issues were framed:

“(1) आया प्रश्नगत वाहन स्कूटर संख्या RJ 19 1M-8523 के चालक विपक्षी संख्या- के द्वारा दिनांक 2.2.96 को मसुरिया सिंधियों के बास में उक्त वाहन को उपेक्षा/उतावलेपन से चलाकर की गई दुर्घटना में आई चोटों के परिणामस्वरूप श्रीमति यात खोतून की मृत्यु हुई ?

(2) आया उक्त वाहन चालक तब उक्त वाहन स्वामी विपक्षी संख्या 2-3, के नियोजन में होकर उसी के हितार्थ एवं लाभार्थ कार्य कर रहा था ?

(3) आया विपक्षी संख्या चार बीमा कम्पनी द्वारा अपने लिखित कथन की प्रारम्भिक आपत्तियों एवं विशेष कथन के मद्देनजर बीमा क0 अपने दायित्व से मुक्त हो सकती है नहीं तो इसका प्रभाव ?

(4) आया दावेदार अपने दावे में अंकित प्रश्नगत राशि या अन्य कोई न्याय सम्मत राशि पा सकते हैं हा तो कौन कौन दावेदार कितनी कितनी राशि किस किस विपक्षी से एवं किस प्रकार से पा सकते हैं ?

(5) आया विपक्षी श्रीमति रश्मि ने स्कूटर दि0 5.10.95 को ही विपक्षी नं. 1, 2 को बेच कर कब्जा दे दिया था और वह क्लेम के लिए उत्तरदायी नहीं है ?”

After taking evidence and hearing the contesting parties, learned Judge of the Tribunal came to the conclusion in issue No.1 that the accident was caused by rash and negligent driving of the scooter by the non-applicant No.1. Issue No.2 on the question as to whether the driver was plying the vehicle in employment of and for the benefit of owner was decided against the Insurance Company for want of evidence and arguments. It is significant to notice that on issue No.5 framed on the plea taken by the owner of the scooter about selling of

the vehicle to the non-applicant Nos.1 and 2 (who is one and same person), no evidence was led and, therefore, issue No.5 was decided against the non-applicants. While taking up quantification of compensation, learned Judge of the Tribunal found the loss of contribution from the deceased at the rate of Rs.1000/- per month and applying a multiplier of 5 to a multiplicand of Rs.12,000/- allowed Rs.60,000/- as pecuniary loss and adding up other losses found the claimants entitled for compensation in the sum of Rs.71,000/-.

On issue No.3 learned Judge took up for consideration the contention about want of driving licence with the driver, raised with reference to the admission of the scooter driver as made before the Court of Addl. Chief Judicial Magistrate No.2, Jodhpur (Ex.A/2) that he was not holding any driving licence. This contention of the insurer was resisted on behalf of the claimants only with the submissions to the extent that even if the vehicle was being driven by a person not holding valid driving licence, insurer ought to make payment to the claimants and then to recover the same from the insured. Learned Judge of the Tribunal accepted such contentions and held that insurer ought to make payment to the claimants and then would be entitled to recover this amount from the insured because of violation of policy conditions. This part of the award wherein insurer has been directed to firstly make

payment to the claimants has been sought to be assailed in this appeal.

This appeal was filed on 26.02.2001 and was admitted on 08.02.2002 and of course by way of interim directions, the execution of the remaining award was stayed, however, learned counsel Mr.Choudhary appearing for the claimants has informed that entire amount of award in question has already been paid to the claimants. Be that as it may, the fact remains that after the decision by the Tribunal on 20.11.2000 and after filing of this appeal, the principles of law in relation to breach of policy conditions for want of driving licence and parameters for avoiding the liability by the insurer have been settled by the authoritative pronouncement of the Hon'ble Supreme Court in the case of National Insurance Co. Ltd. Vs. Swaran Singh and others: 2004 ACJ 1 and the Hon'ble Supreme Court has been pleased to hold that mere absence, fake or invalid licence or disqualification of the driver for driving, are not in themselves defences available to the insurance company and it is enjoined upon the insurer to establish that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicle by duly licensed driver.

This Court in the case of National Insurance Company Vs Pukhraj (CMA No. 82/1999 decided on 20.03.2006) after referring to the decision of the Hon'ble Supreme Court in Swaran Singh (supra) and of this court in New India Assurance Company Ltd. Vs. Smt. Jamna Devi & Ors.: 2004 RAR 456 has observed:

"The insurer has totally failed to show that the insured was guilty of negligence or did not take reasonable care or knowingly handed over the vehicle to be driven by a person not holding a valid licence. For want of such essential ingredients, the plea sought to be raised by the insurer remains hollow and does not lead to the result of any finding that there was any violation of policy conditions by the insured for which the insurer could be exonerated.

Moreover, it was required to be proved by the insurer that the driver though possessing learner's licence and driving the vehicle, this itself was the main or contributory cause of the accident. This Court following the decision in Swaran Singh's case (supra) has held in the case of New India Assurance Company Ltd. Vs. Smt. Jamna Devi & Ors. : 2004 R.A.R. 456 (Raj.) thus,-

"If driver possessing licence for one type of vehicle and he is found driving another type of vehicle is not main or even contributory cause of accident then the Insurance Company cannot avoid the liability. The reason is plain and simple. The nexus is required to be find out between the breach and between the cause of accident. If there is no nexus then the Insurance Company cannot avoid its liability under the contract as the breach can be said to be only a technical breach of condition and the accident is not result of that breach....."

The Hon'ble Supreme Court in Swaran Singh's case (supra) has specifically ruled to the effect that in different cases, on evidence led before the Tribunal, a decision has to be taken whether the fact of driver possessing licence for one type of vehicle but found driving another type of vehicle was the main or contributory cause of the accident. The Hon'ble Supreme Court has termed this kind of breach of condition as merely "a technical breach" and that the insurer would not be allowed to avoid its liability merely on that basis. In the present case, neither any such nexus is pleaded, nor any such evidence has been led by the insurer nor any material is available on record so as to countenance such an objection."

Though in the present case, the Tribunal has proceeded to exonerate the insurer relying merely on the fact that the driver admitted want of licence with him, there is no finding that the insured failed to take reasonable care in fulfilling the policy condition nor any nexus has been established that the accident was direct or proximate cause of want of driving licence with the driver. In fact, the insurer has not even taken any such plea in the reply nor led any evidence to that effect.

Learned counsel Mr.Vyas though frankly submitted that the law declared by the Hon'ble Supreme Court in Swaran Singh's case (supra) makes it clear that mere absence of driving licence is not in itself a defence available to the insurer; but then referred to sub-paragraph (ii) and (v) of paragraph 102 in the said decision of Swaran Singh to submit that insurer is entitled to raise a defence in terms of Section 149(2)(a)(ii) of

the Act; and that any criteria cannot be laid down as how the burden of establishing the defences and breach of policy conditions is to be discharged and the same would depend upon facts and circumstances of each case; and in the present case, such burden stands discharged with proof of admission of the driver himself. Learned counsel also referred to the decision of the Hon'ble Supreme Court in National Insurance Co. Ltd. Vs. Kusum Rai and others: (2006) 4 SCC 250 to submit that it was duty of the owner to verify before handing over the vehicle the fact as to whether driver possesses valid driving licence or not. Learned counsel also submitted that in the circumstances of the case, even if the award as such is maintained, the recovery rights as extended under the impugned award ought to be retained in favour of the insurer-appellant. The submissions are lacking in requisite strength and cannot be accepted.

The insurer in this case has produced in evidence one N.K.Rathi as DW-1 who made a cryptic statement to the effect that policy Ex.A/1 was issued in the name of Smt. Rashmi (non-applicant No.3) valid from 12.09.1995 to 11.09.1996; and that driver ought to be having valid driving licence that was not available and, therefore, insurer was not liable and that the fact of his not having driving licence was accepted by the driver Rajesh in the court and has produced Ex.A/2. The

pleading has been taken by the appellant insurer in its reply in relation to the want of valid driving licence in the manner that there was no valid driving licence with the non-applicant No.1 and, therefore, there was no liability of the insurer for making payment of compensation. It has again been repeated in paragraph 18 of the reply that owner of the vehicle has not extended information of accident to the insurer and, therefore, has violated policy conditions and as such the insurer does not stand in liability and this apart, there was no liability in the insurer as the driver had no valid driving licence. Not even a suggestion has been made in the reply averments that the insured was guilty of negligence or failed to exercise reasonable care in fulfilling condition of policy regarding use of vehicle by duly licensed driver. No such pleading that could be of the foundation for the proof of negligence or want of reasonable care with the insured has been taken in the case. Moreover, as noticed above, the evidence whatever led is absolutely shaky and has not even a word of mouth has been stated that the insured was guilty of negligence or of taking reasonable care.

In view of such meek and cursory stand taken by the insurer, this Court is clearly of opinion that the requirements as laid down by the Hon'ble Supreme Court in Swaran Singh's

case (supra) are not fulfilled and, therefore, the insurer has failed to discharge its initial burden. The Hon'ble Supreme Court in Swaran Singh's case (supra), apart from holding that mere absence of driving licence or disqualification of the driver for driving is not in itself defence available to the insurer who has to prove that insured was guilty of negligence and failed to exercise reasonable care, has been pleased to hold further that the insurer in order to avoid its liability must not only establish the available defence but must also establish breach on the part of the owner of the vehicle, the burden of proof wherefor would be on them. The Hon'ble Supreme Court held,-

"102. (iv) The insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle, the burden of proof wherefor would be on them."

It is obvious that mere proof of want of driving licence is not sufficient to exonerate the insurer of its liability. Reliance placed upon the decision in Kusum Rai's case (supra) is of no assistance to the issue sought to be raised by the appellant. In Kusum Rai's case (supra), the Hon'ble Supreme Court has not stated the law in any terms different than the law declared in Swaran Singh's case and other directions were

issued only in view of peculiar facts and circumstances of the case. Learned counsel attempted to rely heavily upon paragraph 16 in Kusum Rai's case wherein the Hon'ble Supreme Court has observed that owner of a vehicle cannot contend that he has no liability to verify the fact as to whether the driver of the vehicle possessed a valid licence or not. Such observations have no application to the facts of the present case inasmuch as such a question upon and in relation to the owner would have arisen only if the appellant had discharged its initial burden of establishing want of reasonable care and of breach on the part of insured. The initial burden having not even been taken by the insurer what to say of discharge, the contentions sought to be raised by learned counsel Mr. Vyas are of little effect.

Learned counsel Mr. Vyas further attempted to rely upon paragraph 77 in Swaran Singh (supra) to submit that when admittedly there was no licence, the breach is established and the insurer is entitled to be exonerated. The submission is not well found. In paragraph 77 also, the Hon'ble Supreme Court while dealing with an admitted case of want of licence has held,-

"In a case, therefore, where the driver of the vehicle admittedly did not hold any licence and the same was allowed consciously to be driven by the owner of the vehicle by such

person, the insurer is entitled to succeed in its defence and avoid liability."

(emphasis supplied)

The observations aforesaid are in no way away, apart or different than the law declared and summed up by the Hon'ble Supreme Court in summary of findings in paragraph 102 (at page 33 of report) in Swaran Singh's case (supra). The suggestion that absence of driving licence itself is sufficient for the Insurance Company to avoid its liability stands contrary to the law declared by the Hon'ble Supreme Court as noticed above.

In this view of the matter, the insurer having failed to discharge its initial burden of conscious breach of policy conditions by the insured, the issue No.3 is required to be decided in toto against the appellant-insurer; this is apart from the fact that Insurance Company has failed to establish nexus of the accident with the want of licence with the driver. Viewed from any angle, issue No.3 is required to be decided against the insurer who having failed to establish the conditions necessary for exoneration, cannot avoid its liability.

In this view of the matter, the very basis of the finding on issue No.3 as recorded by the Tribunal is knocked out and the said issue is required to be decided against the appellant-

insurer. Once the said issue is decided against the appellant-insurer, there remains no question of even permitting insurer to make any recovery from the insured and payment having already been made by the insurer to the claimants and the award having been satisfied, no further directions are required.

For the result, the insurer fails and the appeal is dismissed. No costs.

(DINESH MAHESHWARI),J.

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